February 17, 2022

Response of Anne Herzberg on Behalf of the Institute for NGO Research to the 22 November 2021 Letter of UN Special Rapporteur Michael Lynk to the Local Government Pension Scheme

On behalf of the Institute for NGO Research, Anne Herzberg[1] presents the following response to the 22 November 2021 letter[2] authored by UN Special Rapporteur Michael Lynk to the Local Government Pension Scheme (LGPS), "Responsible Investments – UN Guiding Principles on Business and Human Rights Investments in the Israeli settlement economy." This response corrects multiple misrepresentations made by Lynk in his letter, relating to business and human rights in conflict zones and the UN Human Rights Council "database". We hope that this response will provide the LGPS and its members with information to aid in ongoing supervision of its investment policies and activities of the pension scheme. We also hope that this information will assist the LGPS in protecting itself and its managers and affiliates from attempts to politicize the funds' policies and practices to the detriment of its beneficiaries and employees.

[1] The Institute for NGO Research is a Jerusalem-based research organization. Members of the Institute have published multiple studies and policy papers on international human rights and humanitarian law, business and human rights, the UN system and NGOs, and fact-finding in situations of armed conflict. Elliott Abrams, Senior Fellow for Middle Eastern Studies at the Council on Foreign Relations; former Canadian Ambassador to Israel, Amb. Vivian Bercovici; Michal Cotler-Wunsh, former member of Knesset for the Blue and White Party; Hon. Michael Danby, MP, senior member of the Australian Labor Party; Harvard Professor Prof. Alan Dershowitz; Canadian Senator, Hon. Linda Frum; best-selling author and commentator and British journalist and international affairs commentator, Tom Gross; Bonnie Glick, former Deputy Administrator and Chief Operating Officer of USAID; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; Douglas Murray, Director of the Centre for Social Cohesion, best-selling author and commentator; former Member of Italian Parliament, Hon. Fiamma Nirenstein; UCLA Professor and President of the Daniel Pearl Foundation, Prof. Judea Pearl; US Jurist and former Legal Advisor to the State Department Judge Abraham Sofaer; Dr. Einat Wilf, former member of Knesset with the Israel Labor Party and advisor to Shimon Peres; Harvard Professor Prof. Ruth Wisse; R. James Woolsey, former US Director of Central Intelligence; and Israeli Supreme Court Justice, Justice Elyakim Rubinstein.
Anne Herzberg (J.D., Columbia University School of Law; B.A., Oberlin College). She is the author of multiple books, articles, and research studies on international humanitarian and human rights law, international criminal law, and business and human rights, and has presented on these issues at several international conferences. She is also a member of the Business and Human Rights Scholars Association. Publications include: "Misreading Human Rights Due Diligence," *Opinio Juris*, November 25, 2021; "UN Treaty Body Promotes BDS at Urging of a Norwegian NGO," *BESA Center Perspectives Paper* No. 1,530, April 15, 2020; "*Kiobel* and Corporate Complicity: Running with the Pack," *American Journal of International Law* Special Kiobel Agora, (January 2014); "When International Law Blocks the Flow: The Strange Case of the Kidron Valley Sewage Plant," *10 Regent J. of Int'l L.* 71 (2014); *NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict*, (September 2008, 2d edition December 2010)."Boycotts, Divestment, Sanctions and the Law," with Jonathan Turner, 54 *Justice* 15 (2014); "NGO Factfinding for IHL Enforcement: In Search of a New Model," with Gerald Steinberg, 51 Israel Law Review 261 (2018)."A Farewell to Arms: NGO Campaigns for Embargoes on Military Exports: the Case of the UK and Israel," with Gerald Steinberg & Asher Fredman, 19 *Israel Affairs* 468 (2013); *Best Practices for Human Rights and Humanitarian NGO Fact Finding*, with Gerald Steinberg and Jordan Berman (Nijhoff 2012).

[2] https://balfourproject.org/bp/wp-content/uploads/2021/12/LetterLynk22112021-1.pdf

The Institute is concerned[3] that activists promoting BDS (boycott, divestment, and sanctions) against Israel – a campaign that Lynk has promoted[4] – are targeting the LGPS to drag the scheme into a highly controversial and contested political debate in order to advance their narrow and discriminatory agenda in both policymaking and investment decisions, to the detriment of pension beneficiaries. We are also concerned that this BDS campaign seeks to push LGPS and its members to adopt policies and standards that are inconsistent with the position of the UK government, international business and human rights guidelines, and international law. In addition, relying on BDS claims and acquiescence to such demands come with significant exposure for pension funds, their management, and their employees, including potential legal actions based on defamation, breach of fiduciary duty,[5] market manipulation, violations of anti-discrimination laws, and breach of counter-terror regulations.

We urge, therefore, that these efforts be rejected.

UN Special Rapporteur for the Palestinians

Before unpacking the legal and factual misrepresentations in his letter, it is important to provide background context regarding the position of UNHRC Special Rapporteur for the Palestinians, under whose capacity Mr. Lynk addressed the LGPS.

UN General Assembly Resolution 75/151 emphasizes that the principles of non-selectivity, impartiality, and objectivity apply for all bodies in the UN system, including "special rapporteurs and representatives, independent experts and working groups" when carrying out their mandates (para. 7).

The Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, however, is UN human rights mechanism that is marred by extreme bias, selectivity, and partiality.

First, in contrast to every other special procedures country mandate that must be renewed by vote on an annual basis, the Rapporteur is the only indefinite mandate, as noted on OHCHR's webpage, enduring "until the end of the Israeli occupation."[6]

[3] https://www.pensions-expert.com/DB-Derisking/LGPS-urged-to-divest-from-Israeli-settlement-economy?ct=true
[4] See next section.
[5] Daniel Harris, "BDS and English Law: Taking Stock," *Justice No. 67*, https://www.ijl.org/justicem/no67/12/.
[6] https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en

Second, it is the only UNHRC mandate that is overtly selective and partial, aimed at examining alleged violations by Israel alone ("To investigate Israel's violations of the principles and bases of international law"[emphasis added]) and not any other actors in the conflict. In other words, Palestinian violations and systematic atrocities committed by the PA and Palestinian terror groups are expressly excluded. While one Rapporteur (Wibisono, 2014-16) attempted to provide a somewhat more balanced approach[7] beyond the mandate, the other holders, including Lynk, have maintained the extreme selectivity and bias.

Third, the Special Rapporteur position, with one exception has been filled by demagogues with extensive histories of anti-Israel campaigning and who have used their platform to promote extreme hostility towards Israel, boycott campaigns, and antisemitism.[8]

As noted by legal scholar and former member of the Inter-American Commission on Human Rights, Christina Cerna, who applied for the Special Rapporteur position but was rejected due to a lack of an overtly hostile record towards Israel:

> In my view Israel has a unique status in the UN Human Rights Council. Impartiality is not a requirement sought by the Council for the appointment of experts when it comes to Israel. I was selected as the consensus candidate of the Consultative Committee for the post of UN Special Rapporteur on the Occupied Palestinian Territories earlier this year, but the Organization of Islamic Cooperation and the League of Arab States both officially opposed me, which killed my candidacy. They opposed me for "lack of expertise," although my entire professional life has been involved with human rights, but because I had never said anything pro-Palestinian and consequently was not known to be "partial" enough to win their support. The candidate that they officially supported was considered to be partial in their favor. No other special procedures mandate is similarly biased. At the end of the day, neither I nor the OIC candidate was appointed, but the Indonesian diplomat, Makarim Wibisono, who was appointed, was considered sufficiently "pro-Palestinian" to be acceptable to the OIC.[9]

The Rapporteur also employs a selective and discriminatory approach to civil society. The Rapporteur engages almost exclusively with NGOs that share his anti-Israel prejudices and

[7]Wibisono was the only Rapporteur to reach out to the Institute, an NGO in special consultative status with ECOSOC to provide inputs for his reporting in an attempt to provide more balance.

[8] https://unwatch.org/wp-content/uploads/2009/12/Mandate-to-Discriminate-UN-Watch-Report-March-10-v548.pdf

[9] https://www.ejiltalk.org/after-gaza-2014-schabas/

narrow political agenda. These NGOs get special notifications of reporting and other initiatives in order that their publications are extensively cited in Rapporteur reports. NGOs that might present a more pluralistic approach or information that does not conform to the Rapporteur's selective mandate and biased methodology are excluded from his work. This practice has continued under Lynk's tenure.

In addition, the Rapporteur participates in and lends his and the UN's endorsement to events with fringe groups and individuals active in BDS and other forms of anti-Israel advocacy. The Rapporteur has also elevated and promoted individuals responsible for antisemitic and violent incitement. In 2017, the Institute filed a complaint against Lynk for such an incident, and the UN subsequently changed one of his reports.[10]

In keeping with past Rapporteur appointments, Lynk, a Canadian national, has had a long history of anti-Israel campaigning both prior to and during his tenure as Rapporteur, including BDS campaigns and promotion of the Israel apartheid canard. As a result, his candidacy for Rapporteur was opposed by Canada.[11]

As Rapporteur, Lynk has advocated for extreme BDS positions. For instance, in 2019, in an interview with Al Jazeera, Lynk called for the EU to cut "economic, political and cultural ties with Israel" and for the UN to suspend Israel's membership.[12] Rapporteurs also have complete leeway to determine the topics for their reporting. It is notable that for his last report to the UNHRC scheduled to be presented in March 2022, Lynk has chosen to "investigate" the canard that Israel is apartheid – a claim used by BDS groups to challenge the legitimacy of Israel's existence as a Jewish state. Most recently, on 2 Feb 2022 on his Twitter feed, Lynk improperly retweeted and endorsed as "responsible", the 1 February 2022 Amnesty International report which accused Israel of being an apartheid regime and calling for boycotts and sanctions against Israel in response.[13] In contrast to Lynk's endorsement, the Amnesty report was widely rejected by government leaders including by UK, US, Germany, and Canada, and the Jewish community.[14] Moreover, far from being "responsible", the report calls for an arms embargo on Israel and for the Palestinian Authority to end security cooperation with Israel.

[10] http://www.ngo-monitor.org/pdf/AmutaComplaintMichaelLynkManalTamimi.pdf; https://www.ngo-monitor.org/press-releases/un-lynk-report-tamimi-ngo-monitor/

[11] https://www.macleans.ca/news/canada/dion-questions-canadian-appointment-as-un-human-rights-advisor/; See also https://www.ngo-monitor.org/unhrc-appointees-ngo-connections-and-attacks-against-israel/

[12] https://www.aljazeera.com/news/2019/7/11/un-official-devises-blueprint-for-israeli-accountability.

[13] https://twitter.com/MichaelLynk5/status/1488651031747575809?s=20&t=IzWqGWqJS8CKDjf2w2aNJQ

[14] https://www.timesofisrael.com/we-do-not-agree-uk-rejects-amnesty-report-accusing-israel-of-apartheid/

Business and Human Rights in Armed Conflict

Turning to the letter, as an initial matter, and contrary to the simplistic and distorted portrayal offered by Lynk, it is important to detail business and human rights principles applicable in situations of armed conflict. The OECD Guidelines for Multinational Enterprises (OECD MNEs) and the UN Guiding Principles (UNGPs) state that when operating in areas of armed conflict, institutional investors and businesses should conduct "enhanced due diligence" resulting from potentially heightened risk and negative human rights impacts. These instruments highlight that human rights due diligence is a non-punitive, pluralistic, layered, and cooperative process tailored for the specific needs of an individual business and industry sector, and intended to engage multiple relevant stakeholders.

Rather than a cooperative process of engagement, however, some activists instrumentalize the enhanced due diligence process to promote the cessation of business operations in Israel and the territories, and divestment from Israeli companies. BDS groups wrongly posit that business and investment activities must be barred simply based on the location of such activities, irrespective of how alleged human rights violations are specifically tied to them. These groups also seek to improperly establish ethnic, national, or religious criteria as a basis for determining the acceptability of business and investment activity. None of these conclusions is mandated, nor recommended, by the OECD MNEs, UNGPs, nor any of the other existing business and human rights guidelines. Indeed, the OECD Guidance explicitly notes that only in "some limited cases" and as a "last resort" should companies decide to discontinue business operations or relationships.

In addition to the misrepresentation of international business and human rights standards, the BDS campaign fails to take into account, beyond cursory citations, the requirements of international law. It confuses the legal obligations of governments as opposed to institutional investors and private business. It ignores competing human rights considerations and fails to appreciate the challenges faced by businesses and investors needing to balance competing stakeholder interests, while also complying with multiple and overlapping regulatory environments.

Instead, BDS activists selectively cite to a provision of a human rights or humanitarian law instrument as providing the basis for a claim of violation, using one-sided, partial, or even false information. The alleged existence of this violation is then used to implicate a corporation or investor in this abuse, regardless of how attenuated the connection might be between its business activity and the alleged violation. The proposed remedy is almost invariably that the specific business activity must be ended and there must be divestment from the jurisdiction.

This flawed BDS methodology is reflected throughout Lynk's letter.

Lynk purports to endorse enhanced due diligence in his recommendations, but rather than applying the standards of the international instruments, he instead applies the BDS argumentation. For instance, he begins his letter with the statement that Israeli settlements (term undefined) are illegal. He then mentions multiple human rights violations stemming from the existence of such settlements. He next claims that "settlements are sustained, in significant part, by international and Israeli corporations who are heavily invested in the thriving settlement economy." He offers no definition of "settlement economy" and provides no specific examples of what it means to be "heavily invested" in the "settlement economy". Furthermore, he provides no guidance as to how specific businesses or investments are directly or even indirectly responsible for the alleged human rights violations he claims results from the "settlement economy". Nevertheless, he invariably concludes, regardless, "it is impossible to engage either directly with the Israeli settlement economy or indirectly through investments with corporations that are engaged in the settlement economy." Therefore, he recommends LGPS should "influence investee companies to desist from involvement in the settlement economy" or divest if a company "cannot give clear assurance that it itself has removed itself entirely from the settlement economy."

To support his radical conclusion, Lynk includes in the appendix to his letter a quote from an obscure and unsourced paragraph in a 2018 report by the Palestine department at the UN Office of the High Commissioner for Human Rights (OHCHR), which says that "it is difficult to imagine a scenario in which a company could engage in listed activities [activities purportedly linked to Israeli settlements] in a way that is consistent with the Guiding Principles and international law." Not only is this statement completely false as a factual matter (as there are a myriad of ways in which listed activities could be carried out in accordance with the UNGPs and international law, see below for examples), this claim marks a radical and unsupported departure from the due diligence guidelines of the OECD MNEs, the UNGPs, and the Principles for Responsible Investment, as well as from international law. Unsurprisingly, Lynk's standard is applied to Israel alone.[15]

It should be noted that in 2018, the UK government did not vote in favor[16] of a UNHRC resolution on Israeli settlements, specifically because it rejected this report.

In addition, the term "settlements" is not defined in this 2018 report, and the "listed activities" referred to are arbitrary, exceedingly broad, discriminatory, and often contradictory. Several of these activities mentioned are unconnected to settlements. None of them is illegal in and of itself. The report makes no distinctions as to the purpose of the

[15] Eugene Kontorovich, "Unsettled: A Global Study of Settlements in Occupied Territory," Northwestern Public Law Research Paper 16-20, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835908

[16] https://www.gov.uk/government/news/human-rights-council-37-explanation-of-votes-on-resolutions-on-israel-and-the-occupied-palestinan-territories

business activity, nor the types of services provided. It also ignores the potential human rights impacts that might occur due to the cessation of business activity. Essentially, this report erroneously equates any business activity whatsoever occurring over the 1949 Armistice lines with "illegal settlement activity" and calls for it to be prohibited.[17] This proposition is not supported by international law.

In contrast to the extreme standard advanced by Lynk (again echoing that of BDS), and as mentioned above, the UNGPs, OECD MNEs, and other international guidelines (as well as case law, National Contact Point decisions, and business due diligence reviews) wholly reject the adoption of broad exclusionary criteria based solely on location of operations in a conflict zone. Instead, these widely accepted instruments advise case-by-case evaluation of human rights impacts; balancing of applicable and competing human rights, IHL, domestic, and international regulations; consultation with stakeholders; engagement with host governments; and development of mitigation strategies. They do not recommend a blanket cessation of or barring of economic activity in either areas of occupation or settlements.[18] In fact, as stressed in the "Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors", jointly issued by the UN Global Compact and the Principles for Responsible Investment Initiative,[19] business operations in conflict zones can bring substantial benefits to conflict-affected areas including "economic development and/or recovery"; "generating tax revenue," "creating job opportunities," "fostering coexistence and mutual beneficial development," creating local value; and improving infrastructure.[20]

It should be noted that under international law and specifically IHL, the *lex specialis* governing conflict zones and occupied territory, there is no prohibition to conducting business therein. Importantly, the reason for such a standard is clear: adopting such an approach would mean the blocking of all economic activity, which would inherently deprive civilians of employment and vital services such as water, gas, food, transport, and medicine. Doing so, besides the practical implications and the unmitigated suffering such situation would cause, is a violation of international human rights law and IHL. Under human rights law, people have the right to food, water, medical care, and the right to livelihood. Under the law of occupation (e.g. 1907 Hague Convention Articles 43, 55; 1949 Fourth Geneva

[17] http://www.ngo-monitor.org/nm/wp-content/uploads/2017/01/Submission-to-HRC-on-Blacklist.pdf at 4-7.

[18] For a more in depth discussion see Anne Herzberg, Submission to the Working Group on Business and Human Rights Project on Business in Conflict and Post-conflict Contexts: Corporate Due Diligence in Situations of Armed Conflict, available at https://www.ngo-monitor.org/submissions/submission-on-business-in-conflict-andpost-conflict-contexts-corporate-due-diligence-in-situations-of-armed-conf/

[19] https://www.unpri.org/download?ac=1724

[20] https://www.unpri.org/download?ac=1724 at 10

Convention Articles 55, 56), the Occupying power is required to maintain public order and safety as well as public infrastructure. How is an Occupying Power supposed to provide such goods and services if not through business and economic activity?

In fact, many courts, administrative bodies, and regulators have explicitly rejected the OHCHR claim, promoted by Lynk, that "it is difficult to imagine" a way in which a company could operate over the 1949 Armistice lines in keeping with international standards and law. Not only have these judicial bodies imagined it, they have found that such is the exact case with regards to businesses operating in these areas.

For example, in March 2013, a French appellate court dismissed a lawsuit brought by the Palestine Liberation Organization (PLO) and the Palestinian activist group Association France-Palestine Solidarité (AFPS) against three French companies: Alstom, Alstom Transport, and Veolia Transport.[21] The PLO and AFPS accused the companies of violating international law, in particular complicity in "war crimes" due to violations of Article 49(6) of the Fourth Geneva Convention, by participating in contracts to build the Jerusalem light rail, which the claimants alleged was settlement activity in occupied territory. In addition, they claimed that these contracts violated Israel's obligations under the Hague Convention and the UN Global Compact. The plaintiffs sought the cancellation of the contracts.
The French appellate court rejected these claims. The court looked to whether the legal norms relied upon provided non-state entities with a private right of action and decided that the obligations of the Geneva and Hague Conventions only apply between state parties. In addition, the court considered whether an unlawful act had even been claimed. The court noted that building the Jerusalem light rail was not illegal because military occupation itself is not illegal, and Article 43 of the Hague Convention allows for the governance of occupied territory, including the building of transportation infrastructure.

The court also discounted the claims that use of the light rail was illegal because it would entrench "illegal settlements." Importantly, the court emphasized that the determination of the purpose of a contract and its legality cannot hinge on "the individual assessment of a social or political situation by a third party." Moreover, the alleged "political motive

[21] Cour d'appel [CA] [regional court of appeal] Versailles, 3 ch., March 22, 2013, 11/05331 (Fr.), *available at* http://fr.slideshare.net/yohanntaieb3/decision-de-lacourdappel [hereinafter Cour d'appel], *translated at* http://blog.eur.nl/iss/hr/files/2012/02/Decision-Versailles-Appeal-Court-22-March-2013.pdf). Anne Herzberg Submission to OHCHR, Remedies Project, 2014 https://www.ngomonitor.org/submissions/submission_of_the_amuta_for_ngo_responsibility_to_the_office_of_the_high_commissioner_for_human_rights_for_the_study_of_domestic_law_remedies_for_corporate_involvement_in_gross_hu man_rights_abuses/#easy-footnote-bottom-30;

attributed to the State of Israel" in the court's opinion, could not "be applied by 'contamination' to the purpose of the contracts."[22]

The "United Nations Database"

In addition to lobbying LGPS to adopt a highly controversial and contentiousstandard barring investments, Lynk advocates LGPS to be guided by listings on a "United Nations database" published on 13 February 2020 by the Palestine office at OHCHR. Lynk advises LGPS to target the companies listed on the "database" for divestment.

Importantly, the UK government did not vote in favor of the creation of the database (UNHRC Resolution 31/36), and in 2018, the UK mission did not support a resolution adopting a preliminary report on the database noting that its creation was "concerning". In further explaining its vote to the UNHRC, the mission stated,[23] "we urge those responsible for implementing this database to avoid doing so in ways that would exacerbate tensions and risk creating a de facto blacklist." Yet, a de facto blacklist is precisely the intended use of the database, as confirmed by BDS activists and Lynk's letter.[24] In response to a Parliamentary Question on the database in 2019, the government responded:

> In March 2016 and March 2017, the UK, along with other EU member states, abstained on the resolution at the UN Human Rights Council which called for the creation of this database. The UK strongly opposed this provision and considered that it went beyond the competence of the Human Rights Council.[25]

To bolster his ill-conceived advice, and in contradiction with the position of the UK government, Lynk makes the following assertion:

> "In developing the Database and the accompanying report, the OHCHR conducted advanced engagement with all of the companies listed through all of the stages of its work before its publication. After this extended engagement, the companies were only listed if they

[22] For more examples, see Anne Herzberg, "*Kiobel* and Corporate Complicity: Running with the Pack," *American Journal of International Law* Special Kiobel Agora, (January 2014); "When International Law Blocks the Flow: The Strange Case of the Kidron Valley Sewage Plant," *10 Regent J. of Int'l L.* 71 (2014); *NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict*, (September 2008, 2d edition December 2010). See also, *Jesner v. Arab Bank*, 584 U.S. __ (2018), slip opinion at 24 (active corporate investment in conflict zones "contributes to the economic development that so often is an essential foundation for human rights.")

[23] https://www.gov.uk/government/news/human-rights-council-37-explanation-of-votes-on-resolutions-on-israel-and-the-occupied-palestinan-territories

[24] Anne Herzberg, https://www.jns.org/opinion/new-details-on-the-un-bds-blacklist/

[25] https://questions-statements.parliament.uk/written-questions/detail/2019-04-01/HL14984

> still met a required standard of reasonable grounds constituting one or more of the listed activities. Thus, the listed companies have already been subject to rigorous and extensive engagement already."

This is simply false and grossly misrepresents the process by which OHCHR compiled the "database".

As an initial matter, the publication of the list itself was in February 2020 and was allegedly compiled between September 2017 and August 2019 (see below for more details), meaning that even if LGPS were to adopt the list, and it should not for the multiple reasons highlighted in this response, it would be based on information that is many years out of date.

Second, the UN report was compiled according to its own invented methodology and not in accordance with the requirements of any UK laws or regulations. Adopting this list could therefore represent a breach of the obligations for LGPS required by law.

In particular, the request from Lynk ("I am writing to ask you … [t]o divest LGPS of its holdings in any of the companies that are listed in the database, if the company cannot give clear assurance that it itself has removed itself entirely from the settlement economy" …) is, it must be stressed, an unqualified request. As explained by experts in investment management, Lynk's demand must be understood by administering authorities of LGPS within the legal framework in which they operate:

(1) Administering authorities under the scheme are quasi-trustees and must act in the best interests of the members. Subject to the terms of any responsible investment policies, non-financial factors may only be taken into account if two tests are met: (1) trustees should have good reason to think that scheme members would share the concern; and (2) the decision should not involve a risk of significant financial detriment to the fund. The highly divisive nature of the Israeli-Palestinian dispute is an unconvincing candidate for any consensus, this is all the more so when the policy at issue is the extreme action of divestment.[26]

(2) Even if a consensus across beneficiaries is detectable, authorities are still required to act in the best interests of the fund.[27] This process involves a duty to reach the decision with due skill, care, and diligence. In practical terms, the trustee must give proper weight to relevant considerations. There is a serious risk of liability if

[26] Daniel Harris, *Justice, supra* note 5.

[27] Id.

administrators willfully turn a blind eye to obvious red flags, such as the serious flaws in the factual and legal misrepresentations found in Lynk's letter.

(3) The request for wholesale divestment may amount to market abuse in certain jurisdictions. The assertion that a number of corporations have decided to disengage from corporations engaged in the Israeli settlement economy, without mentioning that there have been purchases over the same period, may be deceptive in that it appears calculated to give a false or misleading signal as to the supply of some or all of the stocks. Disseminating information in the letter is likely to give false or misleading signals as to the supply of one or more of the stocks in circumstances were Lynk knew, or ought to have known, that the information was false or misleading. Scheme administrators and investment managers will therefore be at risk if they effectively act in collaboration with the letter. It matters not that Lynk does not have a profit-motive.

Third, it is a gross mischaracterization to claim that the "listed companies have already been subject to rigorous and extensive engagement already". In contrast to Lynk's claims, this list, discriminatory in intent and effect, was conducted without due process and defames the listed companies by accusing them of committing gross violations of human rights and humanitarian law, including complicity in war crimes, and by failing to differentiate amongst companies with respect to the broad and general allegations made against them.[28]

The database violates due process

The database purports to identify companies "directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements." In essence, it accuses listed companies of complicity in violations of human rights and IHL. Yet the list provides no evidence in its report to support these accusations. Instead, it accuses companies of serious wrongdoing based on ten vague categories – again with no explanation as to how each company falls within each category.

The database shows no direct involvement, nor causality, to "construction and growth of settlements". For instance, one international company is listed as stealing Palestinian "natural resources" (one of the ten categories) apparently because a branch of an Israeli company licenses the name of a product of a subsidiary of the international company and rents a small commercial bakery space in an industrial zone[29] operated by the Jerusalem

[28] In addition to the public reports published by OHCHR, I had multiple meetings with the OHCHR staffers and officials who were responsible for compiling this list. I had meetings with representatives of several companies targeted by OHCHR who shared with me their written and email correspondence to and from OHCHR. I also met with officials on multiple occasions from at least three countries who discussed the lack of due process relating to the creation of this "database" and provided me with specific examples. Many of my observations were confirmed by a BDS activist who recounted his involvement in compiling the list: https://www.jns.org/opinion/new-details-on-the-un-bds-blacklist/

[29] The area of the industrial zone comprised Jewish neighborhoods prior to the 1948 war. The Jordanian army ethnically cleansed all Jews from this area during the war. Only after Israel was able to push back the Jordanian army in 1967 were Jews allowed to return. Thousands of Palestinians and Israelis work side by side in the industrial zone.

municipality (an industrial zone that rents to both Palestinians and Israeli businesses alike). The database does not show how this small business operation in any way uses Palestinian "natural resources" or has any connection to "construction and growth of settlements," as this industrial zone commercial space has existed and been in operation for several decades and would exist and continue to operate without this particular tenant. The database also did not demonstrate that the company even made any profit off of the foodstuffs baked at this location.

In addition to the lack of any evidence of "enabling, facilitating, or profiting" from "construction and growth" of settlements, as mentioned the information contained in the database is several years out of date. According to the database, OHCHR contacted companies "between September 2017 and October 2018." OHCHR then "re-screened all business enterprises prior to the submission of this report to confirm that the activity for which they were included in the database met the applicable standard of proof, during the relevant temporal period." This "rescreening" supposedly took place between 1 January 2018 and 1 August 2019, but little information is provided as to what was done to "rescreen." Some companies that were included on the list told the author of this submission that they had not received any follow-up contact or notifications from OHCHR about the 2020 publication.

The OHCHR Palestine department also sent harassing and incriminating letters to the companies, threatening them with inclusion on the database based on flimsy accusations and single sentence bullet points. These bullet points made generalized allegations without any supporting evidence. Whether to include a company on the database was then based on arbitrary determinations by the two staff members who compiled the list. These staffers do not appear to have been subject to any oversight or accountability for the content of their work by senior level officials. Several UN Member states from Western countries also reported to the author of this submission extreme concern surrounding the secrecy and lack of due process in compiling this list.

The author of this submission has seen several examples of correspondence between the OHCHR Palestine office and the companies, and is greatly concerned by the thin and unsupported allegations. The way in which OHCHR staffers minimized and cavalierly dismissed legitimate company concerns, legal evidence, and other proof that OHCHR's accusations were wholly inaccurate was also highly disturbing. Multiple meetings and phone discussions with OHCHR staffers compiling the list also indicate that discriminatory determinations regarding inclusion on the blacklist were made based on the basis of ethnicity/religion/nationality of the company ownership.

The authors of the database admit that they relied on highly attenuated and indirect links between companies. While the database says it defines "involved" as "substantial and material business activity that had a clear and direct link to one or more of the listed activities," it offers little to no information as to how it defined "substantial" or "material." It appears, as detailed above, that several of the companies are several levels removed from activity alleged in the report's accusations.

According to a BDS activist who said he was involved in the list's preparation, and far from the "rigorous and extensive engagement" claimed by Michael Lynk, if a company told the United Nations it was not involved in the West Bank, the United Nations "removed them from the list without checking" and companies were included because they "didn't bother to answer the Human Rights Committee [sic]."[30]

Database targets consumer goods and services

The vast majority of listed companies are those providing consumer goods and services (food, telecommunications, transportation, gas, water) to both Palestinians and Israelis. The authors of the list seek to bar such companies from operating or to impose discriminatory business criteria with little regard as to the human rights and economic impacts on the local population and the employees of the companies.

- Many of the companies on the list have previously rejected BDS campaigns on the basis that they are facially discriminatory and violate both international and domestic anti-discrimination and human rights laws. This dimension was ignored in the preparation of the database.
- Four tourism companies are included for the alleged violation of "The provision of services and utilities supporting the maintenance and existence of settlements, including transport." The services at issue facilitate the promotion of Jewish and Christian heritage and tourism in Jerusalem and the West Bank. In other words, the database targets companies for promoting Jewish and Christian history in the Holy Land.
- Six companies involved in the food industry are included in the database for "the provision of services and utilities supporting the maintenance and existence of settlements, including transport" and/or "The use of natural resources, in particular water and land, for business purposes." The inclusion of these food companies is in direct violation of articles 55-56 of the 4th Geneva Convention state that the Occupying Power, to the extent means are available, must "ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation." Such obligations include security services, law enforcement, and

[30] https://www.jns.org/opinion/new-details-on-the-un-bds-blacklist/

the construction and maintenance of infrastructure related to roads, telecommunications, water, and health.

- The database includes nine Israeli banks for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport" and/or for "Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses." Given that the database includes East Jerusalem in its definition of "settlements," and at least five of the above banks operate branches in East Jerusalem, the discrimination against banks by demanding that they not provide services in East Jerusalem would make it difficult for Palestinian populations to access such services.
- The database includes businesses that operate in East Jerusalem, and is discriminatory in two directions. Specifically, the database advances a discriminatory policy wherein Jerusalem's Arab and Jewish populations can and should be differentiated from each other, and requires the cessation of what it deems "Israeli" economic activity in East Jerusalem. Moreover, if the companies targeted withdrew their services and goods from East Jerusalem, the end result would economically damage all of Jerusalem's population and be discriminatory: Palestinians would be excluded from receiving basic goods and services in their neighborhoods, while an ethnic/religious test would be created to determine who can provide (i.e. that Jews cannot provide) services. It also appears that the database considers Palestinian-owned businesses in West Jerusalem to be legal, while only Jewish or Israeli-connected businesses in East Jerusalem are considered illegal. The result is therefore religious and national origin discrimination under Israeli domestic and international human rights law.
- Discussions with the OHCHR staffers responsible for the list also suggest that there is flawed understanding of how business and infrastructure function. They seem to believe that if an Israeli phone, cable, water, gas, or other utility stopped providing services to "settlements"[31] that it would be a simple matter for another (it is unclear what type of company would be acceptable) company to easily and immediately step in, build infrastructure, and provide the same level of services. The same faulty understanding also applies to the other listed businesses.

Violation of the Oslo Accords

Another significant problem with the database is that it lists companies that are responsible for carrying out obligations mandated by the Oslo Accords, the agreement that governs the West Bank, mutually agreed to between Israel and the Palestinian Authority, and

[31] It should also be noted that it is immoral and contrary to international human rights and humanitarian law to argue that those living in settlements should be deprived of food, water, gas, electricity, and other basic necessities. One may not agree with Israel's settlement policy but that does not mean that the civilians currently living in those settlements should be starved, denied water, etc.

guaranteed by the international community, including Norway (highlighted by the agreements' moniker). For example:

- Six Israeli telecommunications companies are targeted for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport" and/or for "The use of natural resources, in particular water and land, for business purposes" (emphasis added). This inclusion of such telecommunications companies directly violates Article 36 of the Oslo Accords, which emphasize that "the supply of telecommunications services in Area C to the Settlements and military locations, and the activities regarding the supply of such services, shall be under the powers and responsibilities of the Israeli side" (emphasis added).
- Five of Israeli public transportation companies are listed for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport." This is in direct violation of Annex III of the Israeli-Palestinian Interim Agreement (Article 38) that stipulates that "powers and responsibilities regarding Israeli public transportation to and between Israel and the Settlements and military locations shall be exercised by Israel" and that "Israeli public transportation routes from Israel to and between Settlements and military locations, and/or to other places in Israel, shall be determined by Israel" (emphasis added). In other words, the existence of and parameters of this business activity was explicitly stipulated in mutually agreed upon treaties between Israel and the Palestinians.
- Five oil and gas companies are included for "The provision of services and utilities supporting the maintenance and existence of settlements, including transport" and "The use of natural resources, in particular water and land, for business purposes" (emphasis added). This is in direct violation of Annex IV of the Economic Protocol of the Gaza-Jericho Agreement which codifies the import of petroleum products and enables the PA to import gasoline from Jordan and/or Egypt if "they meet the average of the standards existing in the European Union countries, or the USA standards."[32] The PA signs contracts with Israeli companies to meet its oil and gas needs, including companies targeted by the database.
- The Israeli water company Mekorot is included for "The use of natural resources, in particular water and land, for business purposes" (emphasis added). The inclusion of Israel's national water company is in direct violation of articles 55-56 of the 4th Geneva Convention, which state that the occupier, to the extent means are available, must "ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation." Such obligations include water. Additionally, Israel's involvement in the water sector in the West Bank, supplying water to some Palestinian communities and to settlements, is entirely

[32] http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Gaza-Jericho Agreement Annex IV - Economic Protoco.aspx

dictated by the 1995 Interim Agreement (Oslo II) and the PA-Israeli Joint Water Committee, which states the exact obligations of both sides. In essence, OHCHR claims providing water to Palestinians is a human rights violation.

These ongoing and fundamental problems with the database are precisely why almost all Western democracies, as well as the EU, opposed adoption of UN Human Rights Council (UNHRC) Resolution 31/36 calling for a database. The resolution was proposed by Pakistan, on behalf of the Organization for Islamic Cooperation, and supported by authoritarian regimes. During the vote, 15 countries abstained (Albania, Belgium, France, Georgia, Germany, Ghana, Latvia, Netherlands, Paraguay, Portugal, South Korea, Slovenia, Macedonia, Togo, and the UK).[33]

Conclusion

This response corrects just some of the many misrepresented claims presented by Lynk to LGPS. I would welcome the opportunity to discuss matters with the Committee in more detail.

Respectfully presented,

Anne Herzberg
Legal Advisor and UN Liaison

[33] https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/ResDecStat.aspx; https://unwatch.org/wp-content/uploads/2016/03/Settlements-in-OPT-1.pdf